

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMARR FRANKLIN MURPHY-ELLERSON,

Defendant-Appellant.

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UNPUBLISHED

May 22, 2014

No. 312651

Washtenaw Circuit Court

LC No. 11-001709-FC

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant Lamarr Franklin Murphy-Ellerson appeals by right his jury convictions of two counts of assault with intent to murder (AWIM), MCL 750.83, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), possession of a loaded firearm in a vehicle, MCL 750.227c, discharge of a firearm from a motor vehicle, MCL 750.234a, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, discharge of a firearm toward a dwelling or occupied structure, MCL 750.234b, and carrying a concealed weapon (CCW), MCL 750.227. The trial court sentenced Murphy-Ellerson to serve concurrent terms of 20 to 40 years in prison for his AWIM convictions, 80 months to 10 years in prison for the assault with intent to do great bodily harm convictions, 16 months to 2 years in prison for the possession of a loaded firearm conviction, 32 months to 4 years in prison for the discharge of a firearm from a motor vehicle conviction, 32 months to 4 years in prison for the discharge of a firearm at a building conviction, and 40 months to 5 years in prison for the CCW conviction. The trial court also ordered him to serve a consecutive two year prison term for his felony-firearm conviction. For the reasons stated below, we vacate Murphy-Ellerson's convictions for assault with intent to do great bodily harm, but affirm his remaining convictions and sentences.

**I. BASIC FACTS**

In December 2011, someone fired shots at home where several people had gathered for a party. The shooter fired at the home while driving past it. Matthew Lewis was hit in the leg as he was standing outside the home. Lewis was not able to identify the shooter or the car, but Amber King, another guest at the party, testified that she was in the kitchen when she saw Murphy-Ellerson pull up in a silver car, roll his window down, point a gun in her direction, and fire multiple shots. King stated that she had earlier had a confrontation with Murphy-Ellerson at a convenience store.

Murphy-Ellerson initially denied that he knew King and denied knowing about or being involved in the shooting. In a subsequent statement, he told a detective that he was in the car during the shooting, but was not the shooter. He later recanted and claimed that he was not in the car during the shooting.

The jury found that Murphy-Ellerson was the shooter and convicted him accordingly.

## II. RIGHT TO PRESENT A DEFENSE

Murphy-Ellerson first argues that the trial court deprived him of the right to present a defense by excluding testimony by his stepfather that King tried to solicit money from him in exchange for her testimony. Murphy-Ellerson did not argue before the trial court that the court's evidentiary decision deprived him of his constitutional right to a defense. Therefore, this claim was not preserved for appeal. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). This Court reviews unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Murphy-Ellerson did preserve his claim of evidentiary error. *People v Snyder*, 462 Mich 38, 43-44; 609 NW2d 831 (2000).

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A court abuses its discretion when it chooses a result that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

A criminal defendant has a constitutional right to a meaningful opportunity to present a complete defense. *King*, 297 Mich App at 473. However, the right is not absolute and must be balanced with the court's legitimate interest in regulating the trial process. *Unger*, 278 Mich App at 250. Michigan has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," and such rules generally "do not abridge a defendant's right to present a defense." *Id.*

Here, the primary issue at trial was the shooter's identity and King was the only witness who could positively identify Murphy-Ellerson as the shooter. For that reason, this case largely turned on her credibility. Murphy-Ellerson's lawyer impeached King with inconsistencies in her trial testimony, preliminary examination testimony, and her statements to officers. His lawyer also solicited testimony from her that she had never called or texted Murphy-Ellerson's stepfather and asked him to pay her to tell the truth.

Throughout the proceedings, Murphy-Ellerson's lawyer, the prosecutor, and the trial court discussed the admissibility of a videotape<sup>1</sup> of a text message that King allegedly sent to Murphy-Ellerson's stepfather. Initially, the court reserved ruling on the admission of the videotape until it had an opportunity to review it. Later, Murphy-Ellerson's lawyer made an offer of proof regarding the substance of the videotape. When the court asked how the videotape

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<sup>1</sup> According to the prosecutor, the video was a VHS of a "cell phone with a text message on it . . . that [was] totally illegible."

was not hearsay, Murphy-Ellerson's lawyer responded that it was not being offered for the truth of the matter asserted. On the second day of trial, Murphy-Ellerson's lawyer noted that he was not going to seek admission of the videotape and would instead just ask Murphy-Ellerson's stepfather if he had received a communication from King. He indicated that the testimony would be for impeachment. However, after the prosecutor objected to the proposed testimony as hearsay, Murphy-Ellerson's lawyer did not reassert that the testimony was for impeachment.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Accordingly, if a statement is not offered to prove the truth of the matter asserted, then it is not hearsay. Here, even assuming that the stepfather's testimony was admissible impeachment testimony, any error in the trial court's decision to exclude it was harmless.

The defendant in *Snyder* was charged with shooting a woman. *Snyder*, 462 Mich at 39. The woman testified the defendant shot her after an argument and denied telling anyone that he shot her by accident. *Id.* Defense counsel attempted to solicit testimony that the woman told a witness the defendant had shot her by accident. *Id.* at 39-40. The testimony was excluded on hearsay grounds. *Id.* at 40. Our Supreme Court concluded that the testimony was erroneously excluded because it would have aided the jury in determining the woman's credibility. *Id.* at 44.

Similarly, the prosecution's case rested heavily upon King's testimony. However, unlike *Snyder*, Murphy-Ellerson's lawyer was able to effectively impeach King's story on cross-examination. Further, Murphy-Ellerson's statements to officers supported an inference that he was the shooter, especially his recanted comments that he was present at the shooting. The prosecutor also did not directly or indirectly refer to the precluded testimony during closing argument and rebuttal. Cf *id.* at 45-46. Accordingly, on this record, we conclude that any error was harmless.

### III. DOUBLE JEOPARDY

Murphy-Ellerson next argues that his convictions for assault with intent to do great bodily harm less than murder should be vacated because they violate the constitutional prohibition against double jeopardy. The prosecution concedes the error on appeal. Because the jury convicted Murphy-Ellerson of two counts of assault with intent to commit murder and two counts of assault with intent to commit great bodily harm less than murder for the same circumstances, the lesser offenses must be vacated. See *People v Meshell*, 265 Mich App 616, 633-634; 696 NW2d 754 (2005).

#### IV. BOLSTERING EVIDENCE

Murphy-Ellerson next claims that the trial court erred when it allowed King to testify that she had been threatened by members of Murphy-Ellerson's family.<sup>2</sup> This Court reviews a trial court's evidentiary decisions for abuse of discretion. *Unger*, 278 Mich App at 216. An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it appears that it is more probable than not that the error was outcome determinative. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

Generally, all relevant evidence is admissible. MRE 402. "Evidence is relevant if it has 'any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.'" *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012), quoting MRE 401.

Murphy-Ellerson argues that the testimony was irrelevant because King did not alter her testimony in response and because there is no evidence that the individuals making the threats were acting on his behalf. The prosecution argues that the testimony was relevant to rebut the implication that King had solicited money in exchange for her testimony. In *People v Ackerman*, 257 Mich App 434, 446-447; 669 NW2d 818 (2003), the Court held that redirect examination testimony that a witness did not want to testify because she was concerned about her safety was relevant to rebut an implication that the witness had a motive to provide false testimony. Similarly, in this case, defense counsel implied that King had contacted Murphy-Ellerson's stepfather and asked him for money in exchange for her testimony. Even though King denied the allegations, the questions undermined her credibility. *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

The prosecutor told the trial court that before the preliminary examination King reported she had been threatened. King apparently showed up at the preliminary examination with a black eye and other marks. King reported that she had been jumped by three people and beaten and the people made a reference to Murphy-Ellerson and court. The prosecution also said that King had reported to police that Murphy-Ellerson's sister threatened her numerous times and that his mother also threatened her. Rather than permit all of that testimony, the trial court limited what could be introduced.

King testified that Murphy-Ellerson's sister had contacted her and offered her \$500 to not come to court. She also testified that another person she did not know offered to pay her money to not come to court. On recross-examination, King added that she was not saying that the calls were "threatening." Defense counsel also confirmed that Murphy-Ellerson never offered King any money and that she had never had a conversation with him about not going to court. Accordingly, given the accusations raised concerning King's motivation to testify, the evidence

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<sup>2</sup> Although the prosecution sought to admit evidence that members of Murphy-Ellerson's family had threatened King, she actually testified that his sister and an unidentified woman offered her money to not go to court.

was relevant and not substantially outweighed by the danger of unfair prejudice. MRE 401; MRE 403.

## V. INEFFECTIVE ASSISTANCE

Murphy-Ellerson next argues that his trial lawyer was ineffective for failing to investigate and prepare for Rachael Jones's testimony. Murphy-Ellerson timely moved in this Court for remand for an evidentiary hearing to expand the record. We denied the motion because he "failed to offer any proof that his attorney's trial preparation were inadequate with regard to preparing a defense based on Rachel Jones' account of the offense at the time of trial." *People v Murphy-Ellerson*, unpublished order of the Court of Appeals, entered November 25, 2013 (Docket No. 312651). We will not revisit that decision. On the record before us, there is no evidence that his trial lawyer's preparation was inadequate.

## VI. OV 13

Murphy-Ellerson next argues that the trial court improperly scored offense variable (OV) 13 because the evidence did not support a finding that he had committed three crimes against a person within a five-year period. Murphy-Ellerson acknowledges that it was proper to count his two convictions for assault with intent to murder. Further, he argued and we agree that his two convictions for assault with intent to do great bodily harm less than murder cannot be counted because they must be vacated. He also asserts that there was insufficient evidence to support a finding that he committed an earlier shooting in 2011.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

OV 13 addresses a continuing pattern of criminal behavior. MCL 777.43(1). Twenty-five points must be assessed if "the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person." MCL 777.43(1)(c). All crimes within a five-year period, including the sentencing offense, must be counted, regardless whether the offense resulted in a conviction, MCL 777.43(2)(a). A sentencing court is free to consider previously dismissed charges if there is a preponderance of the evidence supporting that the offense took place. *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013).

At sentencing, the prosecutor discussed a prior police report with his sentencing memorandum. The report detailed a shooting in June 2011. The victim of that shooting said he was shot by Murphy-Ellerson. In the sentencing memorandum, the prosecutor asserted that the charges against Murphy-Ellerson were dismissed because the victim failed to appear for the preliminary examination. The prosecutor also indicated that the victim was recently interviewed by police and reiterated that Murphy-Ellerson was the shooter. The court found that "given the information that has been otherwise presented," OV 13 could be scored at 25 points. This evidence, when coupled with two convictions involved in this case, was sufficient to support the trial court's scoring of OV 13.

## VII. STANDARD 4 BRIEF

Murphy-Ellerson also raises several issues in a brief that he submitted on his own behalf.

### A. PROSECUTORIAL ERROR

Murphy-Ellerson first raises an unpreserved claim that the prosecutor erred during closing argument by making incorrect statements about transferred intent, by expressing his opinion about witness credibility, by making statements that invaded the province of the jury, and by characterizing Murphy-Ellerson as having a propensity to commit crime. Unpreserved claims of prosecutorial error are reviewed for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Moreover, this Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010) (quotation marks and citation omitted).

This Court reviews a claim of prosecutorial error on a case-by-case basis by examining the allegedly improper remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Although a prosecutor may not make an unsupported statement of fact to the jury, he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case. *Unger*, 278 Mich App at 236.

Murphy-Ellerson first argues that the doctrine of transferred intent is premised on an impermissible presumption. Because he presents this argument along with his claim of prosecutorial misconduct, we conclude that Murphy-Ellerson is arguing that it was error for the prosecutor to make comments during his closing argument that dealt with transferred intent. In closing, the prosecutor stated:

What's important for you to consider, especially as it relates to the victim . . . is this idea, this legal idea that I mentioned for a moment in my opening about transferred intent. Transferred intent means—and, again, the Judge will explain it to you. But transferred intent means that if I try and shoot him, but by mistake I shoot you, I am just as guilty as if I would have shot him. It's . . . a fairly simple concept.

Really, all it means is you can't say I didn't do anything wrong because I missed, because I accidentally shot somebody else. If I had the intent to kill somebody but I shot somebody else, I'm guilty. If I had the intent to do great bodily harm to somebody but I missed and shot somebody else, I'm guilty. That's what transferred intent means.

Murphy-Ellerson argues that the states are split on whether a defendant who fires one shot at a group of people can be convicted of one or more crimes, and he claims that Michigan caselaw has not resolved the issue. However, in *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992), this Court held that the requisite intent for assault with intent to commit murder may be transferred. Therefore, the prosecutor's comments were not a misstatement of Michigan law.

Murphy-Ellerson next argues that the following statements by the prosecutor were highly prejudicial and improper:

But what's even more important than that, and I would suggest it's this. *We are suggesting, the charges suggest that we believe that this defendant tried to kill people. . . .* Not just shoot up the house in some random fashion to scare somebody, but tried to kill.

*Now, why do I say it's important as far as what happened to [the shooting victim]? It's important because if [he] is shot with the very first shot and goes down, and then at least four more shots are fired in the same direction, somebody's trying to kill. They're not trying to warn. They're not trying to scare. When you shoot somebody, and they go down, and you keep going boom, boom, boom, boom right there, you are trying to kill. I don't think there's any other conclusion that can be reached from that scenario. [Emphasis added.]*

On the basis of the totality of the evidence, it is reasonable to infer that Lewis was struck by the first or at least one of the first bullets fired. Accordingly, the prosecutor's remarks were not improper. The prosecutor does not have to state inferences in the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Further, in context, the prosecutor was not asking the jury to convict Murphy-Ellerson on the basis of his own opinion that Murphy-Ellerson was guilty. Rather, the prosecutor described the evidence concerning the shooting and permissibly suggested that the evidence showed Murphy-Ellerson had the intent to kill.

The prosecutor did not make any improper remarks during closing. Moreover, because the prosecutor did not make any improper remarks, Murphy-Ellerson's lawyer cannot be faulted for failing to object to the remarks. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

#### B. OV 3 AND OV 4

Murphy-Ellerson also argues that the trial court improperly scored OVs 3 and 4.<sup>3</sup>

OV 3 addresses physical injury to the victim. MCL 777.33(1). The trial court must assess 25 points if a "life threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). Medical testimony is not required to establish that an injury is permanent or life-threatening. See *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007). Murphy-Ellerson argues the trial court was not permitted to score OV 3 at 25 points because he did not cause a life threatening injury or a permanently incapacitating injury.

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<sup>3</sup> He also reiterated his belief that the trial court erred in scoring OV 13. However, as we have already explained, the trial court did not err in scoring OV 13.

At the preliminary examination, Lewis was in a wheelchair as a result of the gunshot wound. He testified that his “femur bone is shattered in a million pieces, they had to put a metal rod from my hip just below my knee and I have a plate right about my knee.” At trial, he testified that he has been unable to work since the injury. He explained that he was still under a doctor’s care and that his leg was growing improperly. He said that he was going to have to do physical therapy and if the therapy was unsuccessful then his leg might have to be re-broken. Further, it is clear that from the time of the shooting until the time of trial, a period of almost 7 months, Lewis was still unable to walk unassisted. OV 3 was properly scored.

OV 4 addresses psychological injury to a victim. MCL 777.34(1). The trial court must assess 10 points if a “serious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). In making this determination, the fact that treatment has not been sought is not conclusive. MCL 777.34(2). However, “[t]here must be some evidence of psychological injury on the record to justify” the assessment of the points. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012).

In response to Murphy-Ellerson’s challenge to this score at sentencing, the prosecutor told the court that he had had interacted with Lewis throughout the proceedings and recognized that Lewis was “deeply troubled” and “deeply affected” by the shooting. He noted that Lewis had “struggled a great deal with” his inability to work. He also stated that he spoke with Lewis’ father “about that very issue” and his father told him that Lewis has had and continues to have “difficulties” as a result of the shooting. As this Court has explained, the rules of evidence do not apply at a sentencing hearing and a trial court may rely on evidence that would otherwise be inadmissible at trial. *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008). As such, the trial court could rely on the prosecutor’s representations from Lewis and Lewis’ father concerning Lewis’ psychological difficulties. And we are not left with the definite and firm conviction that the trial court erred when it found that Lewis suffered a serious psychological injury. *Hardy*, 494 Mich at 438.

## VIII. CONCLUSION

For the reasons explained above, we vacate Murphy-Ellerson’s convictions for assault with intent to do great bodily harm less than murder. Because there were otherwise no errors warranting relief, we affirm his remaining convictions and sentences. We further remand this case to the trial court for the ministerial task of correcting the judgment of sentence.

Vacated in part, affirmed in part, and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Michael J. Kelly